

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1879 of 1994
with
Special Civil Application No.1850 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgement?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

N.P. PATEL

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 1879 of 1994
MR BP TANNA for the Petitioner.
Ms. Harsha Devani, Assistant GOVERNMENT PLEADER,
for Respondent No. 1
NOTICE SERVED for Respondent No. 2

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 07/02/2002

ORAL JUDGEMENT

1. Both the petitioners were serving at the relevant

time as Executive Engineers and after conclusion of the departmental enquiry, both of them were removed from service. The said action is impugned in the present Special Civil Applications.

Since the issues involved in both these petitions are common, both these petitions are disposed of by this common judgment.

2. It is required to be noted that by an order dated 16.11.1992, both the petitioners were removed from the post of Executive Engineer. At the time of admitting these matters, the said removal order was stayed by this Court. Accordingly, both the petitioners are protected by way of interim relief. During the pendency of the Special Civil Applications, the interim relief remained in force till today and, in the meanwhile, both the petitioners have retired on attaining the age of superannuation.

So far as Special Civil Application No.1879 of 1994 is concerned, the petitioner has retired by way of superannuation in December, 2000 and so far as the petitioner of Special Civil Application No.1850 of 1994 is concerned, he has retired as back as on 29th February, 1996 and by virtue of the interim relief granted by this Court, they continued in service irrespective of the said removal order.

3. The petitioners were subjected to departmental proceedings in connection with irregularities in the matter of drilling of tube wells during the scarcity, which ultimately led to the enquiry. The incident in question had taken place during the period between 1972 and 1973.

So far as Special Civil Application No.1879 of 1994 is concerned, the petitioner therein was subjected to charge-sheet, dated 17.1.1980, Annexure 'A', page 17. The charge-sheet contained five charges. The aforesaid charge-sheet was issued in connection with the tube well work, which was carried out during 1972-'73. It was alleged that because of the aforesaid irregularity on the part of the petitioner, the Government suffered loss of Rs.6,79.937.00.

So far as Special Civil Application No.1850 of 1994 is concerned, the petitioner therein was subjected to charge-sheet dated 15.3.1980, and in the said charge-sheet, three charges were mentioned against him. So far as the charge in connection with classification of

the layer of earth regarding soft rock and boulders is concerned, both the petitioners were subjected to the said charge on the ground that the aforesaid classification was not properly made, with the result that the Government was required to pay Rs.6,79,937/-. The said charge was common so far as each of the petitioners herein is concerned. However, so far as petitioner of Special Civil Application No.1879 of 1994 is concerned, the said charge is worded slightly differently in the sense that it is alleged against him that he had not done proper classification of strata, i.e. layers of the land, while so far as the petitioner of Special Civil Application No.1850 of 1994 is concerned, it is stated that even though he was aware that the classification is not proper, still, he permitted the work and payment was made.

4. The petitioners replied the said charge-sheet and pointed out that the charge levelled against them are not correct and they gave detailed reply to the said charge-sheet. It is required to be noted that for the alleged incident regarding drilling tube wells, at the relevant time, there were about 22 delinquents, who were subjected to the charge-sheet and, ultimately, there was a joint enquiry in connection with all the 22 delinquents. It is required to be borne in mind that even though the incident in question was of the year 1973, the charge-sheet was issued for the first time after lapse of a considerable time, i.e. in the year 1980. The enquiry thereafter commenced in December, 1981 and the same was completed in December, 1985. In May, 1986, the Enquiry Officer submitted his report to the State Government. However, the order of penalty was not passed at a time against each delinquent. As per the submission of the learned Advocate for the petitioners, penalty order was issued against 7 Officers in December, 1986 and by the said order, different penalty orders were passed in the nature of withholding of increment or passing reversion order, but it is not in dispute that none of the employees was subjected to either removal order or dismissal order.

So far as the present petitioners are concerned, ultimately, second show cause notice was given to them, along with the finding of the Enquiry Officer's report, and both of them also submitted their final reply. Thereafter, by the final order of penalty dated 16.11.1992, both the petitioners were removed from service, though each of them was given separate removal orders. However, it is required to be noted that in the year 1992, the petitioners had filed Special Civil

Application Nos. 8196 of 1992 and 8197 of 1992, as, at that time, the petitioners were apprehending punishment orders against them. Those petitions were filed at the stage when no final order was passed in the departmental enquiry, and it seems that, in each of those petitions, same interim order was passed. However, in view of the subsequent final order of removal, the present two Special Civil Applications have been filed by the petitioners, challenging the said order, and as far as the earlier two petitions were concerned, they were filed at the interim stage before any final order was passed and they were, ultimately, disposed of by this Court.

So far as Special Civil Application No.8196 of 1992 is concerned, the same was filed by the petitioner of Special Civil Application No.1879 of 1994 and the same was withdrawn on the ground that final order was subsequently passed and the petitioner has challenged the said final order by filing Special Civil Application No.1879 of 1994. The other petition, i.e. Special Civil Application No.8197 of 1992, was rejected by the Court on the ground that the same was filed when the enquiry was in progress. However, none of the aforesaid petitions was adjudicated on merits by the Court and, ultimately, the present two Special Civil Applications have been filed against the final order passed by the Department against each of the petitioners. As stated earlier, since in both the present petitions interim relief was granted by this Court at the time of admitting the petitions, the petitioners were allowed to continue on the post and, ultimately, they have retired as Executive Engineers, but since both these petitions are pending and since the order of removal is questioned in these proceedings, naturally, they are not paid retiral dues or any other benefits and accordingly, now these petitions are disposed of finally.

5. At the time of hearing of this petition, it was argued by Mr.Kerial, who is appearing for Mr.Tanna, learned Senior Advocate, appearing for the petitioners, that the incident in question is as back as of the year 1972-'73. Here, the enquiry was initiated after a period of about 7 years, i.e. in the year 1980. He also further submitted that during the pendency of the enquiry proceedings, the Presenting Officer of the State Government has submitted his report and he has clearly stated that the charges can never be proved and there is no evidence against the petitioners as well as any of the delinquents (since a joint enquiry was held against 22 delinquent Officers at the relevant time) and that it is even otherwise a case of "no evidence", and yet, the

Enquiry Officer found that certain charges against the petitioners were held to have been proved. Before even passing the final order of removal and before even issuing the second show cause notice to each of the petitioners, the Government had already sent necessary papers to the GPSC, seeking their approval for passing appropriate order of removal and that the GPSC has granted their approval and thereafter, after getting such approval, the petitioners were subjected to the second show cause notice. It is, therefore, submitted that the action of the Government in not sending the matter back to the GPSC, after getting reply from the petitioners regarding the second show cause notice, for fresh approval is bad and that before passing the final order, the necessary documents were not sent to the GPSC, which are in the nature of reply to the second show cause notice given to the petitioners and, therefore, the order of removal is vitiated. It is also submitted that, even otherwise, when there were similar charges levelled against other 20 Officers, there was no reason to single out the present petitioners for punishment in the sense that they were subjected to harsh punishment of removal, and lighter punishments were given to other similarly situated employees, who were also subjected to similar show cause notices, and especially when there was a joint enquiry of all the aforesaid 22 employees. It was lastly submitted that, in any case, there is an unreasonable delay after the conclusion of the departmental enquiry. The Enquiry Officer submitted his report in May, 1986 and even though, in 1986, about 7 delinquents were subjected to penalty order, no penalty order was passed against the present petitioners and, ultimately, punishment order was passed as late as on 16th November, 1992. It is, therefore, submitted that there is considerable delay between the conclusion of the enquiry proceedings and passing of the final order and that, in that view of the matter, it is clear that this is not a case in which such maximum penalty could have been given, as the Department itself was not so serious about the matter, otherwise, they could have passed the removal order moment the departmental enquiry concluded. It was also submitted that the penalty in question is otherwise also very harsh and even considering the misconduct, which is proved in the departmental enquiry, the punishment in the nature of removal is on the excessive side, as even in the enquiry, it is not proved that either of the petitioners was guilty of any serious misconduct and that no charge of misappropriation of any amount is proved against any of the petitioners. It is submitted that considering the fact that the petitioners also continued throughout in view of the interim order of this Court and since they

have retired from service, it is a fit case in which minor penalty in the nature of censure or withholding of one increment is required to be passed by substituting the order of penalty passed by the Disciplinary Authority. It is argued that this Court should exercise the powers under Article 226 of the Constitution of India by substituting the punishment passed by the Disciplinary Authority.

Mr.Kerial has relied upon the decision of the Apex Court in State of Punjab v. Ram Singh, AIR 1992 SC 2188 to substantiate his say that the act of misconduct attributed to the petitioners is mere error of judgment, carelessness or negligence in performance of duty. He has relied on the observations made by the Apex Court in paragraph 5 of the aforesaid judgment, which reads as under :-

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5. Thus it could be seen that the word 'misconduct' though not capable of precise definition, its reflection receive its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful behaviour, wilful in character; forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty, the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires to maintain strict discipline. Laxity in this behalf erodes discipline in the service causing serious effect in the maintenance of law and order.

... .."

6. Ms.Harsha Devani, learned AGP, on the other hand, submitted that on the basis of the evidence available on

the record, the Enquiry Officer has reached the conclusion of guilt against the petitioners. She further submitted that this cannot be said to be a case of "no evidence", or that it is a case of mere negligence, and that, on the basis of the evidence on record, ultimately, the finding is given by the Enquiry Officer, which is accepted by the State Government. She further argued that so far as the argument regarding delay in instituting the enquiry is concerned, no such specific point is taken in the petition and, therefore, it is not possible for the Department to deal with the said point in reply. She further submitted that so far as the delay at the second stage, i.e. after conclusion of the enquiry, is concerned, the petitioners are not prejudiced by such delay and, in her submission, they are benefited, in the sense that, after the enquiry, the removal order was deferred for a long time and, all throughout, the petitioners continued in service. In her submission, the said delay, therefore, cannot be said to be prejudicial to the petitioners in any manner and, according to her, the same was favourable to them in the sense that the punishment order was deferred for a long time, by which it cannot be said that any prejudice is caused to the petitioners.

She also further submitted that when there is some evidence available on record, based on which the Disciplinary Authority has taken action, this Court cannot substitute the finding of the Disciplinary Authority, as this Court is not sitting in appeal over the decision of the Disciplinary Authority. She further submitted that the role attributed to the present petitioners, as compared to other delinquent officers, is different and considering the facts and circumstances of each case, appropriate punishment order is passed. She also submitted that this Court cannot substitute the penalty imposed by the Disciplinary Authority and in case the Court comes to the conclusion that the penalty is disproportionate to the misconduct proved, then, the only alternative available to the Court is to send the matter back, instead of substituting the penalty. She further submitted that even consultation with the GPSC is not a sine qua non and that it is not a mandatory provision. Yet, in her submission, before taking final decision, the opinion of the GPSC was also taken into consideration. On all the aforesaid grounds, therefore, she has supported the decision taken by the Disciplinary Authority.

7. So far as Special Civil Application No.1879 of 1994 is concerned, the Enquiry Officer's report is

produced at page 138. Three charges were held to have been proved by the Enquiry Officer, i.e. charges 1, 3, and 5. So far as charge No.1 is concerned, it has been found that the petitioner was responsible for not exercising his technical judgment correctly. The relevant observations in the Enquiry Officer's report is as under :-

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If Shri Patel would have been a little more vigilant, in observing the time taken to drill the tube wells in bouldary formations and compared with the time taken, in those tube wells, where boulders are not encountered, probably Shri Patel would have come to the conclusion that the gradation of the bouldary formation done by him was not correct which would have saved Govt. large amount of money. Shri Patel is, therefore, considered responsible for not exercising his technical judgment correctly.

... .."

So far as charge No.3 is concerned, it is also proved against the petitioner. The same is in connection with the defect in civil and mechanical work at Dharnoj, Taluka Patan, Patra, Taluka Harij, and Vavol, Taluka Sami. In the Enquiry Officer's report, it is observed as under :-

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As regards charge No.3, regarding defective civil and mechanical work at tubewell Dharnoj, Ta. Patan, Patra, Ta. Harij, Vavol, Ta. Sami, Shri N.P. Patel in his defence statement filed on 17.11.80 states that the tubewell at Dharnoj tenure and as such, he is not responsible for the same. Shri N.P. Patel is silent regarding other two tubewells viz. tubewell at village Patra, Ta. Harij and village Vavol, Ta. Sami. He is silent and hence, charge of defective works on these two tubewells stands and hence he is considered responsible for these defective tubewells.

... .."

Regarding charge No.5, which is in connection with drilling extra depth in 16 out of 54 tubewells, it is found that the petitioner should have been little more careful in his day-to-day supervision and that would have saved extra expenditure. Ultimately, the conclusion was reached by the Enquiry Officer that the petitioner is responsible in not exercising technical wisdom in restricting the drilled depth. The aforesaid three charges were accordingly held to have been proved against the petitioner of Special Civil Application No.1879 of 1994.

8. So far as Special Civil Application No.1850 of 1994 is concerned, the Enquiry Officer's report is produced at page 44. So far as charge No.1 is concerned, which is in connection with payment of extra amount, it is found that the petitioner is responsible for not exercising his technical expertise. Same finding is reached so far as charge No.3 is concerned, which is in connection with extra drilling. Regarding Charge No.5, which was in connection with incomplete civil work at Village Fatehpura, Taluka Dhanera, it is found by the Enquiry Officer that he has not substantiated whether the defects have been rectified and completed satisfactorily and his statement that the works have been got completed, leads to his indirect admission that at the time of investigation of these tube wells, the works were defective and tube wells and machinery were in a dilapidated condition. It is found that he is also responsible for the same. Ultimately, all the three charges levelled against the said petitioner were held to have been proved. The aforesaid report is accepted by the State Government in toto and, ultimately, final order, as stated earlier, was passed.

It is no doubt true that in Special Civil Application No.1879 of 1994, it has been found by the Enquiry Officer that the petitioner of that Special Civil Application has not used his technical expertise properly. It is also required to be noted that in none of the aforesaid cases, there is any finding of any financial irregularity. It is also not proved that any of these petitioners tried to oblige some Contractor by way of carrying out some extra work. Therefore, in both the aforesaid cases, ultimately, it is found that the petitioners were, to some extent, negligent in using their technical knowledge properly. However, reading the Enquiry Officer's report, it is not possible for me to accept the say of Mr.Kerial that the said finding is perverse or based on no evidence at all. On the basis of

the available material on record, he has reached the conclusion that the petitioners have failed to exercise their technical knowledge in a proper manner and accordingly, in substance, each of the petitioners is found to be negligent in performance of their duty in carrying out the aforesaid project work.

Though, of course, it is not proved that either of the petitioners had acted in such a manner, by which they have got some financial benefit, yet, in my view, it is not possible for this Court to come to the conclusion that the finding on the part of the Enquiry Officer is based on no evidence at all, as the Enquiry Officer, in the facts and circumstances of the case, on the basis of the available material, reached the said conclusion. It is required to be observed that this court is not sitting in appeal over the decision of the Disciplinary Authority and, if there is some evidence on record on which the conclusion is based, the same cannot be interfered with by this Court in a petition filed under Article 226 of the Constitution of India. In my view, therefore, the argument of Mr.Kerial to the effect that the finding of the Enquiry Officer is either perverse or is a case of 'no evidence', cannot be accepted and accordingly, the said argument is negatived. In that view of the matter, it cannot be said that the departmental proceedings are vitiated. It is not in dispute that the petitioners were given appropriate opportunity to defend their case and principles of natural justice were also complied with and, ultimately, the charges are held to have been proved against the petitioners.

Apart from that, in the case of D.T. Makwana v. State of Gujarat & another, 1992(1) G.L.H. 46, this Court, while interpreting the words "for good and sufficient reasons", which are finding their place in the Gujarat Civil Services (Discipline & Appeal) Rules, 1971, after considering the judgment of the Apex Court in the case of Union of India and others v. J. Ahmed, (1979) 2 SCC 286, held as under :-

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8. Reliance was placed by Mr.R.N. Shah on the judgment of Supreme Court in the case of Union of India v. J. Ahmed reported in 1979(2)SCC 286 in support of his contention that such irregularities cannot give any ground for holding departmental inquiry or imposing any penalty. Mr.Shah submitted that it is

essential that there was some misconduct alleged and found to be proved against the delinquent before any penalty can be imposed on him under Rule 6. In the instant case, he submitted, there was no finding of any misconduct and the only finding arrived at by the competent authority was of irregularity and finding of irregularity cannot be made a base for imposing any penalty. Mr. Antani, on the other hand, submitted that the words to the effect that penalties enumerated in Rule 6 may "for good and sufficient reason" be imposed would imply that not only misconduct, but even irregularities and other conduct can be made a ground for exercising powers under Rule 6. The contention canvassed by Mr. Antani does not appear to be convincing because, Rule 6 only enumerates the penalties and it is while imposing such penalties that the question as to whether there is good and sufficient reason has to be examined. In other words, the phrase, "for good and sufficient reasons" is used in the context of penalties which are being imposed when a delinquent is found guilty. This rule is not intended to enumerate the nature of conduct for which penalties may be imposed, but is framed in order to lay down the types of penalties which can be imposed and it is at the stage when penalties are being imposed that the existence of good and sufficient reasons for imposing such penalties would be the relevant criteria. Before such penalties are imposed, procedure has to be undergone for coming to the conclusion that the delinquent is guilty. The procedure has been elaborately laid down in Part IV of the said Rules. It will be noticed that when inquiry is held, the disciplinary authority is required to inquire into "the truth of any imputation of misconduct or misbehaviour or of any culpable act or omission" against a government servant. The statement of "imputations of misconduct or misbehaviour or of any culpable act or omission" is to be delivered to the delinquent along with the articles of charge. Even the procedure for imposing minor penalties which is laid

down in Rule 11 clearly provides that no order imposing on a government servant any of the penalties specified any Items 1 to 3 of Rule 6 shall be passed except after informing the government servant in writing of the proposal to take action against him and of the imputation of misconduct or misbehaviour or of any culpable act or omission on which it is proposed to be taken and recording a finding on each imputation of misconduct or misbehaviour or any culpable act or omission. Thus, for the type of conduct for which penalties can be imposed under Rule 6 one has to refer to Rules 9 and 11 and not to Rule 6 which only enumerates penalties which may be imposed for good and sufficient reasons. The question, therefore, is whether or not the petitioner had committed misconduct, or whether he had committed any culpable act or omission or misbehaviour. It is the actual act or omission which constitutes the imputation and not merely the label whether it is misconduct or misbehaviour or irregularity. A gross irregularity may amount to culpable act or omission. The words "culpable act or omission" are of wide amplitude and would take colour from the context in which they are used while making imputations. As observed by Supreme Court in *Union of India v. J. Ahmed* (supra), there may be negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but that would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be very high. An error can be indicative of negligence and the degree of culpability may indicate the grossness of the negligence. The Supreme Court observed : "Carelessness can often be productive of more harm than deliberate wickedness or malevolence." The Supreme Court disagreeing with the opinion of the High Court that misconduct in the context of disciplinary proceeding means misbehaviour involving some form of guilty mind or mens rea held

that gross or habitual negligence in performance of duty may not involve mens rea but may still constitute misconduct for disciplinary proceedings.

... .."

Considering the nature of the charge, as well as considering the work which was undertaken by the petitioners as well as considering the finding of the Enquiry Officer, it cannot be said that this is either a case of "no evidence", or that no misconduct is committed by the petitioners.

9. So far as the next argument of Mr. Kerial about GPSC's approval part is concerned, it is required to be noted that, earlier, the proposal was sent to the GPSC and the GPSC has agreed with the proposal of the State Government regarding removing the petitioners from service. It is, no doubt, true that after the second show cause notice was issued to the petitioners and after their replies were received, the proposal was not again sent to the GPSC as the same was sent earlier, before passing the final order and after the second show cause notice was issued to the petitioners regarding the proposed penalty. However, at this stage, reference is required to be made to the decision of the Apex Court in State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912. The relevant paragraph is paragraph 12 and the same reads as under :-

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12. We have already indicated that Art. 320(3)(c) of the Constitution does not confer any rights on a public servant so that the absence of consultation or any irregularity in consultation, should not afford him a cause of action in a Court of law, or entitle him to relief under the special powers of a High Court under Art. 226 of the Constitution or of this Court under Art. 32. It is not a right which could be recognised and enforced by a writ.

On the other hand, Art. 311 of the Constitution has been construed as conferring a right on a civil servant of the Union or a State, which he can enforce in a Court of law. Hence, if the provisions of Art. 311, have been complied

with in this case - and it has not been contended at any stage that they had not been complied with he has no remedy against any irregularity that the State Government may have committed.

Unless, it can be held, and we are not prepared to hold, that Art. 320(3)(c) is in the nature of a rider or proviso to Art. 311, it is not possible to construe Art. 320(3)(c) in the sense of affording a cause of action to a public servant against whom some action has been taken by his employer.

... .."

In that view of the matter, the aforesaid contention is required to be negatived. Even otherwise, the Government did send the proposal to the GPSC and the GPSC was consulted and, ultimately, GPSC had agreed for the aforesaid action of removal. In that view of the matter, it cannot be said that, simply because, after receiving the reply to the second show cause notice from the petitioners, the proposal was not again sent to the GPSC, the final order passed by the Government is vitiated on that ground.

10. Now, so far as the argument regarding delay in initiating departmental proceedings is concerned, it is, no doubt, true that the incident in question is as back as of the year 1972-'73 and without any valid reason, the proceedings were not initiated expeditiously and after a period of about 7-8 years, the charge-sheet was issued. However, the petitioners have never challenged the action of the State Government in initiating the proceedings after such a long time. On the contrary, they gave detailed reply on the factual aspect of the matter and, ultimately, took part in the departmental proceedings. At no point of time, it is ever alleged by the petitioners that by initiation of enquiry after such a long time, they are likely to be prejudiced for want of availability of evidence.

11. It is required to be noted that none of the petitioners approached this Court at the time of initiation of departmental proceedings. Instead, they gave detailed reply to the charge-sheet on merits and they also participated in the departmental proceedings. In view of the aforesaid aspect of the matter, it is not

possible to accept the argument of Mr.Kerial that the order of penalty is required to be set aside on the ground of delay in initiation of departmental proceedings. It cannot be said that any prejudice is caused to the petitioners in view of such delay especially when they have led proper evidence before the Disciplinary Authority. Even otherwise, this point is taken for the first time at the time of advancing the arguments and even in the memo of the petition, the said ground is not taken and, therefore, the respondents, naturally, did not get any opportunity to meet the said contention.

12. Similarly, so far as the delay in passing the final order is concerned, it is required to be noted that the enquiry officer submitted his report in May, 1986 and the final order was passed in the year 1992. It is, no doubt, true that, therefore, there is a delay of considerable period for passing the final order. But, even on that ground also, it cannot be said that the order of punishment is vitiated on the ground of aforesaid delay because between the aforesaid period of 1986 and 1992, the petitioners continued to be in service and ultimately, whatever they wanted to submit in the disciplinary proceedings, by way of reply, etc., have already been submitted by them.

13. So far as the last submission of Mr.Kerial about the quantum of punishment is concerned, I find considerable force in the said argument. It is required to be noted that the incident in question had occurred somewhere in the year 1972-'73 and after a considerable period, the charge-sheet was served upon the petitioners. If the charges were so serious, naturally, the Department would not have remained silent for all these years even for initiation of the proceedings. Not only that, even after the conclusion of the enquiry, considerable time was taken in passing the final order. It is also required to be noted that there was a joint enquiry in connection with the very incident, which had taken place in 1972-'73 and it is an admitted position that except the present petitioners, rest of the delinquents were awarded only minor penalties of withholding a few increments or in one case, order of reversion was passed, but no removal order was passed against any one except the present petitioners. It is also an admitted fact that the charge about excessive drilling is common so far as all the 22 delinquents are concerned. Mr.Kerial has also placed on record a chart, showing the punishment inflicted on other co-delinquents of the enquiry proceedings. Copy of the same is also given to the

learned AGP and the same is kept on record. It is required to be noted that in case of one Mr.B.B. Shah, who was serving as Executive Engineer, 6 charges were proved, which were related to monetary loss to the Government and which has been highlighted by the petitioners with the additional affidavit filed by them. It is clear from the said additional affidavit that serious charges were proved against the said Mr.B.B. Shah, who was serving as Executive Engineer. Even though all charges were proved against him, which were six in number, still he was subjected to penalty of reversion to the lower post for a period of two years. Mr.Kerial has strongly relied upon the decision given in the aforesaid case of Mr.B.B.Shah and submitted that the action of the State Government in giving a harsh treatment to the present petitioners is discriminatory and when there was a joint enquiry, similar treatment should have been given to the present petitioners. In my view, it is, no doubt, true that leniency shown in the case of one or other employee cannot be taken as a ground or basis for setting aside the penalty order issued in the case of the present petitioners. However, in my view, penalty of removal is required to be interfered with in the present proceedings for the following reasons :-

- (1) The incident in question is as back as of 1972 and departmental proceedings were initiated after a period of more than eight years;
- (2) After conclusion of the enquiry, final order was passed after a period of about six years;
- (3) By virtue of the interim order passed by the Court, both the petitioners have continued on the same job till they attained the age of superannuation and accordingly, they retired after continuing in service by virtue of the interim order of this Court;
- (4) It was a case of joint enquiry and all other Officers were subjected to minor penalty except in the case of the present petitioners, wherein order of removal was passed;

A n d

- (5) Even as per the report of the Enquiry Officer, which is accepted by the Government, admittedly, no charge about financial gain or corruption is proved against the petitioners and what is proved is not exercising their expert knowledge in a

proper manner, or some sort of negligence.

14. Considering the aforesaid aspect of the matter, and considering the fact that now, the petitioners have also reached the age of superannuation, in my view, the State Government should have taken into consideration the question of quantum of punishment objectively and, prima facie, it appears that, there was no reason to give different treatment to the petitioners as compared to other Officers, who were subjected to similar type of enquiry. Even otherwise, considering the charges which are proved against the petitioners also, it cannot be said that this is a case in which such maximum penalty of removal was required to be passed because even if the report of the Enquiry Officer is taken into consideration, it can be safely said that what is proved is that the petitioners are responsible for not exercising their technical judgment correctly when the project was going on in the year 1972-'73. Taking the cumulative effect of the entire matter as a whole and considering the fact of time lag between the date of the incident and initiation of proceedings, it is not a case in which such extreme penalty of removal was required to be passed against the petitioners. It is not possible, therefore, to uphold the order of the Department so far as the impugned order of removal is concerned, because considering the totality of the circumstances as well as the penalty given to more or less similarly situated employees, order of removal in the instant case against both these petitioners seems to be highly disproportionate and shocking.

15. Mr.Kerial, however, submitted that since the petitioners have retired since considerable time, and since they are not getting any retiral dues because of the pendency of the proceedings, instead of sending the matter back, this Court itself may substitute the aforesaid order of removal and impose penalty of withholding of one or two increments. For that purpose, Mr.Kerial has relied upon the decision of the Apex Court in Om Kumar v. Union of India, (2001) 2 SCC 386. Paragraphs 70 and 71 of the aforesaid judgment read as under :-

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70. In this context, we shall only refer to these cases. In Ranjit Thakur v. Union of India, this Court referred to "proportionality" in the quantum of punishment but the Court observed that the

punishment was "shockingly" disproportionate to the misconduct proved. In B.C. Chaturvedi v. Union of India this Court stated that the court will not interfere unless the punishment awarded was one which shocked the conscience of the court. Even then, the Court would remit the matter back to the authority and would not normally substitute one punishment for the other. However, in rare situations, the court could award an alternative penalty. It was also so stated in Ganayutham.

71. Thus, from the above principles and decided cases, it must be held that where an administrative decision relating to punishment in disciplinary cases is questioned as "arbitrary" under Article 14, the court is confined to Wednesbury principles as a secondary reviewing authority. The court will not apply proportionality as a primary reviewing court because no issue of fundamental freedoms nor of discrimination under Article 14 applies in such a context. The court while reviewing punishment and if it is satisfied that Wednesbury principles are violated, it has normally to remit the matter to the administrator for a fresh decision as to the quantum of punishment. Only in rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the courts, and such extreme or rare cases can the court substitute its own view as to the quantum of punishment.

... .."

It is submitted by Mr.Kerial that in that view of the matter, this Court may substitute the penalty and pass an appropriate order of withholding of few increments.

The aforesaid argument was opposed by Ms.Devani, learned AGP. On her part, she has relied upon the decision of the Supreme Court in the case of B.C. Chaturvedi v. Union of India and others, (1995) 6 SCC 749. She has relied upon paragraph 18 of the said judgment, which reads as under :-

""

18. A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof.

... .."

She submitted that, at the most, the Court can send the matter back and the Court cannot substitute the punishment in the present proceedings.

16. As discussed earlier, the Government itself took considerable time in completing the proceedings and, therefore, the Government itself was not considering the aforesaid misconduct as so serious a misconduct; otherwise, they would not have allowed the petitioners to continue in the employment for such a long time. Of course, no party can take benefit of the circumstances which may arise in view of the time taken during the court proceedings and the interim orders of the Court, but, nonetheless, the fact remains that even for the purpose of initiation of enquiry and even after conclusion of enquiry considerable time was consumed by the Government for the purpose of finalising the enquiry. However, Mr.Kerial submitted that in view of the observations of the Apex Court in the case of Om Kumar (supra), the time taken in the court proceedings should also be taken into consideration and to shorten the proceedings, the Court may substitute the penalty. However, considering the facts and circumstances of the case, instead of substituting the penalty, it would be

better if the disciplinary authority itself reconsiders the quantum of punishment on its own and instead of substituting the penalty in the present proceedings, I direct the Disciplinary Authority to reconsider the

question of penalty imposed on both the petitioners and while reconsidering the said decision, the disciplinary authority may take the following aspects into consideration :-

- (a) Delay in initiation of proceedings, which may have bearing so far as the quantum of punishment is concerned;
- (b) Delay in passing the final order after conclusion of the enquiry;
- (c) Punishment awarded to other co-delinquents, who were subjected to disciplinary proceedings, along with the petitioners in joint departmental proceedings;
- (d) The fact that by virtue of interim order of this Court, the petitioners continued in service and have now already retired from service;

A n d

- (e) Considering the fact that what is proved against the petitioners is that they were responsible for not exercising their technical judgment correctly, or exhibiting carelessness in performing their duty at the relevant time and no charge regarding misappropriation or diverting any Government fund is proved.

Considering the aforesaid aspects, the disciplinary authority may pass appropriate order on the question of punishment by reviewing its earlier order imposing the punishment. While taking such decision, the Department may also take into consideration the misconduct proved against the present petitioners as compared to the misconduct proved against such other officers, who were ultimately subjected to minor penalty.

17. I am sure that the Disciplinary Authority will take just decision keeping in mind the observations made hereinabove by this Court in the present judgment. It is also required to be noted that the petitioners have reached an advanced stage of their lives and they have retired since long and, all throughout, they were

subjected to mental agony during the pendency of the present proceedings.

Mr. Kerial, at this stage, also suggested that the petitioners are even ready to accept the penalty of withholding of one or two increments with or without future effect. However, it is for the disciplinary authority to consider the said aspect since I am sending the matter back to the Disciplinary Authority for reconsideration of the question of quantum of punishment.

Before taking the final decision, if the Authority is of the opinion that any explanation or hearing is required from the petitioners, it would be open for the Government to hear the petitioners, though it may not be treated as a mandate of this Court so far as hearing aspect is concerned and that option is left to the authority concerned.

It is for the concerned authority to decide the question, but the authority may take an appropriate decision and may pass a fresh order of penalty except again resorting to the order of removal or dismissal or any such major penalty which may take away all the service benefits of the petitioners. It is needless to say that, ultimately, some lighter penalty may be imposed by the Disciplinary Authority and looking to the act of misconduct committed by the petitioners, the penalty of removal, on the face of it, is absolutely shocking and disproportionate.

The proceedings are very old and since both the petitioners have retired, such decision may be taken as early as possible, at any rate within a period of three months from the date of receipt of the writ from this Court.

18. The petitions are accordingly required to be allowed partly so far as the question of quantum of punishment is concerned. The petitions are accordingly allowed. The impugned orders of removal of the petitioners from service are quashed and set aside. The State Government may pass fresh order after taking into consideration the observations made hereinabove by this Court. Rule is made absolute accordingly.

Writ of this Court may be sent forthwith.

7th February, 2002 (P.B. Majmudar, J.)

(apj)